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ELLIS & MYERS LUMBER CO. *v.* HUBBARD et al.

Sept. 19, 1918.

[96 S. E. 754.]

**1. Sales (§ 197\*)—Executory Contract—Subject-Matter Not in Existence.**—A contract of sale of lumber not in existence is an executory contract.

[Ed. Note.—For other cases, see 12 Va.-W. Va. Enc. Dig. 15.]

**2. Sales (§ 208\*)—Bargain and Sale Contract.**—A bargain and sale cannot be made of chattels not yet identified, despite intention of parties; it being impossible for ownership to change and for title to pass until the particular property which is the subject of the contract has been ascertained.

[Ed. Note.—For other cases, see 12 Va.-W. Va. Enc. Dig. 15.]

**3. Sales (§ 199\*)—Passing of Title—Intention of Parties.**—Where subject-matter of sales contract is or has become specific, the question of whether title passes becomes wholly a matter of the mutual intention of the parties.

[Ed. Note.—For other cases, see 12 Va.-W. Va. Enc. Dig. 15.]

**4. Sales (§ 201 (1)\*)—Transfer of Title—Delivery.**—Where subject of sales contract is specific, and contract provides title shall pass at a stated time, when the chattel is in a condition specified in the contract, neither delivery of the chattel to the buyer nor the doing of anything so that it may be ready for delivery is essential to the passing of the title.

[Ed. Note.—For other cases, see 12 Va.-W. Va. Enc. Dig. 24.]

**5. Sales (§ 214\*)—Transfer of Title—Manufacture of Goods.**—Where subject of sales contract is specific, and contract provides that title shall pass at a stated time, when the chattel is in a condition specified in the contract, the completion of the manufacture of the chattel is not essential to the passing of the title.

[Ed. Note.—For other cases, see 12 Va.-W. Va. Enc. Dig. 15, 24.]

**6. Sales (§ 200 (3)\*)—Transfer of Title—Measurement—Inspection.**—Where subject of sales contract is specific, and contract provides that title shall pass at a stated time, when the goods are in a condition specified in the contract, the testing of goods, though called for by contract, is not essential to passing of title.

[Ed. Note.—For other cases, see 12 Va.-W. Va. Enc. Dig. 18.]

**7. Sales (§ 200 (2)\*)—Transfer of Title—Ascertainment of Quality or Price.**—Where subject of sales contract is specific, and contract provides that title shall pass at stated time, when the goods are in a condition specified by the contract, the doing of anything necessary to ascertain quality, quantity, or price is not essential to passing of title.

[Ed. Note.—For other cases, see 12 Va.-W. Va. Enc. Dig. 18.]

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\*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

**8. Sales (§ 202 (1)\*)—Transfer of Title—Payment of Purchase Money.**—Where subject of sales contract is specific, and contract provides that title shall pass at stated time, when the goods are in a condition specified by the contract, payment of purchase money or part thereof is not essential to the passing of the title.

[Ed. Note.—For other cases, see 12 Va.-W. Va. Enc. Dig. 14.]

**9. Sales (§ 200 (4)\*)—Transfer of Title—Conditions Stated in Contract.**—Where subject of sales contract is specific, and contract provides that title shall pass at stated time, when the goods are in a condition specified by the contract, such condition is the only condition precedent to passing of the title; all other conditions precedent being thereby waived.

[Ed. Note.—For other cases, see 12 Va.-W. Va. Enc. Dig. 18.]

**10. Sales (§ 200 (4)\*)—Passing of Title—Conditions Precedent—Conditions Subsequent.**—A complete bargain and sale of chattels may be made, subject to a condition subsequent that the chattels shall conform to any stipulated specifications; the title passing at time of bargain and sale, though sale may be defeated by failure of chattels to fulfill stipulated specifications.

[Ed. Note.—For other cases, see 12 Va.-W. Va. Enc. Dig. 14.]

**11. Sales (§ 200 (4)\*)—Transfer of Title—Rules for Determination of Intention.**—Sales contract, providing that title to lumber should pass when lumber was delivered upon certain leased land, plainly and unequivocally expressed the intention of the parties as to when title was to pass, and rules furnishing tests for determination as to passing of title are inapplicable, although contract further provides that lumber was subsequently to be tested, measured, recounted, and accepted by buyer; such conditions being merely precedent to payment of purchase money, and not to passing of title.

[Ed. Note.—For other cases, see 12 Va.-W. Va. Enc. Dig. 15.]

**12. Estoppel (§ 70 (1)\*)—Recognition of Deed of Assignment—Title to Lumber.**—Where contract for sale of lumber provided that title should pass when it was delivered on certain leased land, buyer's acquiescence in seller's deed of assignment did not estop it from claiming lumber on such land, where deed of assignment did not convey lumber, but merely purchase price due.

[Ed. Note.—For other cases, see 15 Va.-W. Va. Enc. Dig. 245.]

**13. Estoppel (§ 70 (1)\*)—Title to Lumber—Acceptance by Seller of Lumber from Seller's Trustee.**—In such case, buyer's acquiescence in the shipment of the lumber by seller's trustee, and acceptance thereof, does not estop it from asserting title to lumber, where, if trustee had failed to ship lumber, buyer could have done so, and deducted expense from contract price.

[Ed. Note.—For other cases, see 15 Va.-W. Va. Enc. Dig. 245.]

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\*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

**14. Estoppel (§ 68 (5)\*)—Garnishment Answer—Title to Lumber.**—Where buyer is garnished by creditors of seller, its answer, recognizing merely its indebtedness on the sales contract, does not estop it from asserting title, as against seller's trustee, to lumber, claiming title had passed.

[Ed. Note.—For other cases, see 5 Va.-W. Va. Enc. Dig. 283.]

**15. Contracts (§ 4\*)—Implied Contracts.**—Where there is an express and enforceable contract in existence governing the rights of the parties, the law will not imply a contract in contravention thereof.

[Ed. Note.—For other cases, see 7 Va.-W. Va. Enc. Dig. 301.]

**16. Assignments for Benefit of Creditors (§ 186\*)—Advances by Buyer—Set-Off.**—Where buyer agreed to advance seller \$400, but in fact made further advances, he could set off such further advances against purchase money due, both as to seller and as to seller's trustee, after seller's assignment for benefit of creditors.

[Ed. Note.—For other cases, see 1 Va.-W. Va. Enc. Dig. 829.]

Appeal from Circuit Court, Russell County.

Suit by J. W. Hubbard and others against the Ellis & Myers Lumber Company. From the decree, defendant appeals. Reversed and remanded

*Hall, Wingfield & Apperson* and *Kime & Kime*, for the appellant.

*W. W. Bird* and *G. B. Johnson*, for the appellees.

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#### ALBERT *v.* STAFFORD et al.

Sept. 19, 1918.

[96 S. E. 761.]

**Wills (§ 118\*)—Execution—Signature or Acknowledgment before Witnesses—Statute.**—Purported will, written by one other than testatrix, and signed, when folded up so as to conceal any writing, by two witnesses who did not see testatrix's name, even if it was there, and did not know whether she had signed it or not, and were not asked by her to witness it as her will, was not entitled to probate, under Code 1904, § 2514.

[Ed. Note.—For other cases, see 13 Va.-W. Va. Enc. Dig. 732.]

Appeal from Circuit Court, Giles County.

Petition by Sallie M. Albert against W. F. H. Stafford and others. From an order admitting a will to probate, petitioner appeals. Reversed.

*W. B. Snidow*, for the plaintiff in error.

*Williams & Farrier*, for the defendants in error.

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\*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.